No. 85905-1-I

SUPREME COURT
OF THE STATE OF WASHINGTON

BROUGHTON LUMBER CO.,
a Washington corporation,

Plaintiff,

v.

BNSF RAILWAY COMPANY; and HARSCO CORPORATION,
a Delaware corporation,

Defendants.

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, PORTLAND DIVISION, HONORABLE GARR M. KING

JOINT BRIEF OF DEFENDANTS HARSCO CORPORATION AND BNSF RAILWAY COMPANY

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I. INTRODUCTION

The Territorial Legislature enacted RCW 64.12.030, Washington's timber trespass statute, to deter the theft of timber and to punish those who intentionally or recklessly enter property to take a plaintiff's trees. The Legislature did not intend to impose treble damages on a defendant whose lawful actions on ad-jacent land and not directed toward the plaintiff's property result in a fire that damages the plaintiff's trees. Plaintiff Broughton Lumber Company's ("Broughton's") interpretation of RCW 64.12.030 is contrary to the Legislature's intent and this Court's precedent.

First, although the statute imposes liability on defendants who "cut down, girdle or otherwise injure, or carry off any tree, timber or shrub on the land of another person . . . without lawful authority", Broughton's "plain meaning" analysis starts and ends with the words "otherwise injure". This Court has rejected such a flawed "plain meaning" approach.

Second, Broughton ignores two related statutes that individually and together demonstrate the Legislature's intent to allow recovery of single compensatory damages for a fire caused by defendants who are not physically present on the plaintiff's land and who do not direct their acts toward a plaintiff's trees or property.

Third, Broughton would have the Court ignore something it has long recognized – that RCW 64.12.030 is a penal statute that is strictly, not liberally, construed to impose liability for specific conduct. Contrary to Broughton's argument, the statute should not be interpreted expansively to keep up with modern developments in the common law of trespass.

Fourth, Broughton would also have the Court disregard the well-settled principle of *ejusdem generis*, but cannot show that the Legislature intended the words "otherwise injure" to include anything but cutting, girdling or carrying off another's trees, or similar types of activities that are not at issue here.

Fifth, Broughton ignores prior judicial construction of RCW 64.12.030 and similarly worded statutes. Not only Washington courts, but courts outside Washington interpreting identical, as well as much broader statutory language, have rejected the contention that a defendant may be liable for punitive damages without physically entering the plaintiff's land or directing its activities toward the plaintiff's trees.

For all of these reasons, or any of them, defendants BNSF Railway Company ("BNSF") and Harsco Corporation ("Harsco") request the Court to answer the certified question in the negative.

II. ISSUE CERTIFIED FOR REVIEW

"Can a plaintiff recover damages under RCW 64.12.030 for trees damaged by a fire that spreads from a defendant's neighboring parcel, where the alleged acts or omissions of the defendant did not occur on plaintiff's property, and were not directed at plaintiff's trees or property?" (Certification Order at 2-3)

III. STATEMENT OF THE CASE

A. Statement Of Facts.

Broughton accurately recites the statement of undisputed facts, based on the parties' stipulation, as certified by the district court.

B. Procedural History.

Broughton sued BNSF and its contractor, Harsco, for damages to its real and personal property from a fire that originated on the BNSF right of way adjacent to Broughton's property. Among other claims, Broughton asserted a claim for treble damages under RCW 64.12.030.

The district court granted partial summary judgment dismissing Broughton's claim under RCW 64.12.030. ***Broughton Lumber Co. v. BNSF Ry. Co.***, 2010 WL 4670479 (D.Or. 2010). The district court then entered its certification order following the

certification of similar issues relating to the scope of RCW 64.12.030 in ***Jongeward v. BNSF Ry. Co.***, 2010 WL 5394873 (E.D. Wash. 2010).[1]

IV. ARGUMENT

A. RCW 64.12.030 Does Not Apply To A Fire That Is The Result Of Actions Occurring Exclusively On Adjacent Property That Are Not Directed Toward Harming The Plaintiff's Trees.

The certified question presents an issue of statutory interpretation, the purpose of which is "to ascertain and carry out the intent of the Legislature." ***HomeStreet, Inc. v. State, Dept. of Revenue***, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). Broughton's arguments, however, are completely at odds with well-settled statutory construction principles, which establish that the Legislature never intended RCW 64.12.030 to apply in a case like this one.

[1] On May 27, 2011, this Court ruled that this case and ***Jongeward*** will be deemed companion cases to be considered at oral argument on the same day.

1. RCW 64.12.030 Was Enacted By The Territorial Legislature To Deter The Theft Of Timber And To Punish Those Who Intentionally Enter Property To Take The Plaintiff's Trees.

RCW 64.12.030 authorizes an award of punitive treble damages "whenever any person shall cut down, girdle[,][2] or otherwise injure, or carry off any tree, . . . timber or shrub on the land of another person . . . without lawful authority." The language of the statute and its history support the conclusion that the statute does not apply here.

This statutory language, which has not changed since it was enacted by the Territorial Legislature in 1869, *see* Laws 1869, p. 143, § 556, was taken from statutes enacted in California in 1851 and Oregon in 1862.[3] *See* ***Gardner v. Lovegren***, 27 Wash. 356, 361, 67 Pac. 615 (1902) (so noting); *see also* Act of Oct. 11, 1862, Or. Gen. Laws ch. 4, §§ 335, 336 (Deady & Lane 1843-1872) (treble damages "[w]henever any person shall cut down, girdle, or otherwise injure, or carry off, any tree, timber, or shrub on the land

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[2] As originally enacted in 1869 and until 2009, there was no comma between the words "girdle or otherwise injure." Broughton makes no argument that this grammatical change in 2009 has any legal significance.

[3] As discussed *infra* at § B, the Oregon and California statutes have been extensively amended and no longer contain language similar to RCW 64.12.030.

of another person, . . ."); ***Stewart v. Sefton***, 108 Cal. 197, 41 Pac. 293, 295-96 (1895) (quoting former California treble damages statute: "Any person who cuts down or carries off any wood or underwood, tree or timber, or girdles or otherwise injures any tree or timber on the land of another person, . . . ").

This Court has previously recognized that the statute was enacted with a very specific purpose in mind: to deter and punish the theft of a valuable resource. *See* ***Guay v. Washington Natural Gas Co.***, 62 Wn.2d 473, 476, 383 P.2d 296 (1963) ("the purpose of the statute [is] . . . to punish a voluntary offender . . . [and] "[t]o discourage persons from carelessly or intentionally removing another's merchantable shrubs or trees on the gamble that the enterprise will be profitable if actual damages only are incurred."); ***Smith v. Shiflett***, 66 Wn.2d 462, 463, 403 P.2d 364 (1965) ("there should be no self-created right of eminent domain."); ***Ventoza v. Anderson***, 14 Wn. App. 882, 892, 545 P.2d 1219, *rev. denied*, 87 Wn.2d 1007 (1976) ("The punitive purpose of the timber trespass statute is to deter intentional trespass."); David H. Bowser, *"Hey, That's My Tree!"—An Analysis Of The Good-Faith Contract Logger Exemption From The Double And Treble Damage Provisions Of Oregon's Timber Trespass Action*, 36 Willamette L. Rev. 401, 403

(2000) (discussing purpose). The Territorial Legislature adopted this law when Washington was covered with marketable timber and logging was the Territory's major economic activity. *See generally*, Ivan Doig, *John J. McGilvra & Timber Trespass: Seeking a Puget Sound Timber Policy 1861*-1865, ***Forest History***, Vol. 13, No. 4, pp. 6-17 (1970) (discussing territorial struggles with timber trespass). Not surprisingly, then, in every single case that has considered the statute over the last 142 years, the defendant (or his or her agent) has been physically present on the land, or has intentionally directed his or her activities toward the plaintiff's trees or shrubs.

The 1869 Territorial Legislature also simultaneously enacted RCW 64.12.040, which provides for single compensatory damages "[i]f upon trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own. . . ." Laws 1869, p. 143, § 557. That statute was intended by the Legislature to preclude treble damages where a defendant's actions were not "willful or reckless." ***Seattle-First Nat. Bank v. Brommers***, 89 Wn.2d 190, 197, 570 P.2d 1035 (1977).

The "casual or involuntary" intent that precludes an award of treble damages under RCW 64.12.040 refers to the intent of the defendant in directing its actions toward the plaintiff's trees in furtherance of the statutory scheme to punish "the willful wrongdoer," who acts with "the intent to commit trespass." ***Luedinghaus v. Pederson***, 100 Wash. 580, 583-84, 171 Pac. 530 (1918) (contractor that had permission to cut trees in railroad right of way not liable where employees exceeded marked boundary).[4] Similarly, the phrase "probable cause to believe that the land . . . was his own" in RCW 64.12.040 shows that the Legislature did not intend to punish a defendant who takes timber while physically present on the plaintiff's land but under a good faith claim of right, or without the intent to destroy or injure the plaintiff's trees.

The Territorial Legislature reenacted both RCW 64.12.030 and .040 in 1877, retaining the original language, Laws 1877, p. 125, §§ 607-08, and these statutes became the law of Washington when it became a state in 1887. The statutory language remained unchanged until 2009, when RCW 64.12.030

[4] Broughton's hypothetical defendant "who, inches from [the] property line, shoots fireworks into a neighboring tree farm intending to start a fire," would therefore be liable for punitive damages, as he would be directing his actions toward the plaintiff's trees. (Broughton Br. at 29)

was amended to clarify that treble damages were available for the unlawful cutting of Christmas trees. Laws 2009, ch. 349, § 4.[5]

Reading RCW 64.12.030 and 64.12.040 together, as the Court must,[6] indicates the Legislature's intent to preclude the recovery of punitive damages from a defendant who, although physically present on the plaintiff's land, takes timber under a good faith claim of right, or without the intent to destroy or injure the plaintiff's trees. *See* ***Maier v. Giske***, 154 Wn. App. 6, 21, ¶ 31, 223 P.3d 1265 (2010) ("trespasser is aware of a property dispute before removing or injuring the plants"); ***Mullally v. Parks***, 29 Wn.2d 899, 911, 190 P.2d 107 (1948) (one who "consciously, deliberately, and intentionally enters upon the disputed area for the purpose of

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[5] In amending the statute to include Christmas trees, the 2009 Legislature characterized RCW 61.12.030 as a "tree theft statute." Final Bill Report, HB 1137 (2009).

[6] While this Court looks first to "the words used in the statute" by the Legislature, ***Union Elevator & Warehouse Co., Inc. v. State ex rel. Dept. of Transp.***, 171 Wn.2d 54, 60, ¶ 10, 248 P.3d 83 (2011), it does so by examining the "entire statute in which the provision is found and . . . related statutes." ***Columbia Physical Therapy, Inc., P.S. v. Benton Franklin Orthopedic Associates, P.L.L.C.***, 168 Wn.2d 421, 433, ¶ 13, 228 P.3d 1260 (2010). *Accord*, ***Union Elevator***, 171 Wn.2d at 60, ¶ 10 ("The plain language of a statute may be determined from all that the Legislature has said in the statute and related statutes which disclose legislative intent") (citations and internal quotation omitted); ***State v. Krall***, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (the meaning of a particular word in a statute "is not gleaned from that word alone, because our purpose is to ascertain legislative intent of the statute as a whole").

destroying, and does destroy, trees"); ***Skamania Boom Co. v. Youmans***, 64 Wash. 94, 97, 116 Pac. 645 (1911) ("the intent to commit trespass must appear."). RCW 64.12.030 thus was enacted solely to deter the theft or destruction of timber by someone on the plaintiff's land, and exempts from treble damages circumstances where a defendant neither enters plaintiff's property nor directs its activities toward harming plaintiff's trees.

2. The Contemporaneously-Enacted Fire Act Imposes Liability for Single, Not Treble, Damages To Plaintiff's Trees Damaged By Fire Spreading from Adjacent Land.

When interpreting the language of RCW 64.12.030, this court also considers contemporaneous "related statues which disclose legislative intent." ***Union Elevator***, 171 Wn.2d at 60, ¶ 10.[7] The Fire Act, RCW 4.24.040-.060, first enacted in 1877 as "An Act To Protect Forests And Timber Lands From Fires And Careless Kindling Of Fires," by the same Territorial Legislature that

[7] The Court has recently criticized the refusal to examine "extrinsic sources" under the pretext of engaging in an analysis of the statute's "plain meaning." ***G-P Gypsum Corp. v. State, Dept. of Revenue***, 169 Wn.2d 304, 309-310, ¶ 10, 237 P.3d 256, 259 (2010) ("We have previously criticized such a crabbed notion of statutory interpretation, holding instead that a statute's plain meaning should be discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.") (quotations omitted). Broughton's narrow statutory interpretation analysis erroneously avoids any discussion of related statutes.

reenacted the 1869 Timber Trespass statutes, is such a statute. *See* Laws 1877, p. 300, § 3

The Fire Act provides that a defendant who destroys forest, timber lands and other property by starting a fire that spreads from adjacent property is liable for single, not treble, damages. RCW 4.24.040-.060. One section of the Fire Act, RCW 4.24.040, imposes liability for compensatory damages from a lawfully set fire that spreads from the defendant's own property:

> If any person shall for any lawful purpose kindle a fire upon his or her own land, he or she shall do it at such time and in such manner, and shall take such care of it to prevent it from spreading and doing damage to other persons' property, as a prudent and careful person would do, and if he or she fails so to do he or she shall be liable in an action on the case to any person suffering damage thereby to the full amount of such damage.

RCW 4.24.040. Another section of the Fire Act, RCW 4.24.050, requires persons who "kindle fires" while "engaged in driving lumber upon any waters or streams" to use "the utmost caution to prevent the same from spreading and doing damage."

A third section of the Fire Act, RCW 4.24.060, expressly preserves compensatory damages under "[t]he common law right to an action for damages done by fires:"

> The common law right to an action for *damages done by fires*, is not taken away or diminished by RCW 4.24.040, 4.24.050, and 4.24.060, but it may be pursued; but any person availing himself of the provisions of RCW 4.24.040, shall be barred of his action at common law for the damage so sued for, and no action shall be brought at common law for kindling fires in the manner described in RCW 4.24.050; but if any such fires shall spread and do damage, the person who kindled the same and any person present and concerned in driving such lumber, by whose act or neglect such fire is suffered to spread and do damage shall be liable in an action on the case for the amount of damages thereby sustained.

RCW 4.24.060 (emphasis added). The substantive provisions of RCW 4.24.040-.060 have remained unchanged for over 140 years.[8] *See* Laws 1877, p. 300-1, §§ 3, 5-6

Both the statutory claim under RCW 4.24.040 (for fires kindled for "any lawful purpose") and the common law claim preserved by RCW 4.24.060 (for "damages done by fire") allow the recovery of single compensatory damages for the value of timber destroyed by a fire that commences on a railroad's adjoining right of way. *See* ***North Bend Lumber Co. v. Chicago, M. & P.S. Ry. Co.***, 76 Wash. 232, 234, 135 Pac. 1017 (1913) (damages under statutory claim "for the value of timber injured and destroyed"

[8] RCW 4.24.040 and RCW 4.24.060 have been recently amended for gender neutrality. Laws 2009, ch. 549, § 1001; Laws 2011, ch. 336, § 93. RCW 4.24.050-.060 were previously amended to delete references to repealed criminal sections of the Fire Act. Laws 1983, ch. 3, §§ 4-5.

caused by fire started on railroad company's right of way); ***Burnett v. Newcomb***, 126 Wash. 192, 217 Pac. 1017 (1923) (defendant who started fire to destroy noxious weeds on his property but negligently allows fire to spread held liable for damage to plaintiff's merchantable timber under Fire Act); ***Sandberg v. Cavanaugh Timber Co.***, 95 Wash. 556, 562, 164 Pac. 200 (1917) (Fire Act "preserves" common law remedy for plaintiff's property destroyed by fire accidentally started by engine used in logging operations on adjacent land); ***Abrams v. Seattle & M. Ry. Co.***, 27 Wash. 507, 68 Pac. 78 (1902) (common law liability for failure to operate locomotive with proper spark arrestors and for allowing fire to spread to plaintiff's property). *See generally*, Annot., *Liability of Property Owner for Damages From Spread of Accidental Fire Originating On His Property*, 17 ALR 5th 547 (1994).[9]

Here, defendants were engaged in lawful track maintenance. *See* RCW 4.24.040. The fire spread from BNSF's property to Broughton's adjacent property. Even if RCW 4.24.040 is inapplicable, RCW 4.24.060 makes clear that in an action "for

[9] Broughton's other hypothetical defendant, who negligently "set[s] fire on his own deeded right-of-way," knowing that "the wind is likely to drive the fire across the property of adjacent landowners", (Broughton Br. at 28), would be liable for compensatory, not punitive, damages under the common law claim preserved by RCW 4.24.060 of the Fire Act.

damages done by fire," a defendant "by whose act or neglect such fire is suffered to spread and do damage" is liable for "the amount of damages thereby sustained" – that is, compensatory damages.

The Legislature has specifically addressed the liability of a defendant who causes injury to "forests and timber lands from fires." Moreover, it has done so in a manner much different than that under RCW 64.12.030, where it imposed punitive damages on a "person who shall cut down, girdle or otherwise injure or carry off" the plaintiff's trees and timber. Broughton would interpret this statutory scheme to allow the recovery of punitive damages for the destruction of trees by fire, but limit a plaintiff to compensatory damages for the destruction of other property, including improvements, livestock, personal property, and even personal injury or loss of life, caused by the same fire. The Fire Act, which specifically imposes liability for compensatory, not punitive, damages arising from fire, further shows the Legislature's intent that RCW 64.12.030 does not apply to a fire that spreads to the plaintiff's adjacent land where, as here, it is undisputed that the defendant was not physically present on plaintiff's land and has not directed its actions toward the plaintiff's trees or property.

3. RCW 64.12.030 Is A Penal Statute That Must Be Strictly Construed. It Has Never Been Broadly Interpreted To Impose Liability For The Destruction Of Trees Caused By Defendant's Activities On Adjacent Property.

Broughton recognizes that Washington law has never subjected a defendant to punitive damages under RCW 64.12.030 for a fire that starts on adjacent land, but nonetheless seeks to expand the scope of Washington's timber trespass law by mischaracterizing this punitive damages statute as "remedial legislation." (Broughton Br. at 6) Broughton does not provide a definition of a "remedial statute" and cites no authority to support the contention that RCW 64.12.030, is remedial.[10] Nor could it, given this Court's repeated recognition that RCW 64.12.030 is "punitive" or "penal."

An action for *compensatory* damages is remedial in nature, while an action that seeks to *punish* for the wrong done is penal.

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[10] This Court has never before characterized RCW 64.12.030 as "remedial." Broughton cites ***Go2net, Inc. v. Freeyellow.Com, Inc.***, 158 Wn.2d 247, 253, 143 P.3d 590 (2008), for the proposition that "remedial statutes are liberally construed." But ***Go2net*** interpreted the Washington State Securities Act, RCW ch. 21.20, not the timber trespass law, and this Court has always characterized the Securities Act as remedial in nature, given its primary purpose to protect investors from fraudulent schemes of promoters. Consistent with that characterization, it has construed the Securities Act broadly. *See* ***McClellan v. Sundholm***, 89 Wn.2d 527, 533, 574 P.2d 371 (1978).

Noble v. Martin, 191 Wash. 39, 59, 70 P.2d 1064 (1937), *overruled on other grounds,* ***Stenberg v. Pacific Power & Light Co., Inc.***, 104 Wn.2d 710, 709 P.2d 793 (1985). *Accord* ***State v. Conte***, 159 Wn.2d 797, 820, 154 P.3d 194 (2007) (quoting 3 Norman J. Singer, *Sutherland Statutory Construction* § 60.02, at 152-53 (5th ed. 1992) ("Usually 'remedial' is used in connection with legislation which is not penal or criminal in nature, in that such laws do not impose criminal or other harsh penalties."), *cert. denied*, 552 U.S. 992 (2007). Consistent with this distinction, this Court has repeatedly held that, because RCW 64.12.030 provides for the trebling of compensatory damages, the timber trespass statute "is penal in its nature, not merely remedial [and] as such, it should be strictly construed." ***Bailey v. Hayden***, 65 Wash. 57, 117 Pac. 720 (1911). *Accord*, ***Gardner v. Lovegren***, 27 Wash. 356, 362, 67 Pac. 615 (1902); ***Birchler v. Castello Land Co., Inc.***, 133 Wn.2d 106, 110, 942 P.2d 968 (1997).

Broughton argues that this oft-recited rule of strict construction applies only to "the imposition of a higher measure of damages," and not to the circumstances that give rise to liability. (Broughton Br. at 26-28) This Court's cases do not support Broughton's attempt to parse the timber trespass statute into a

"remedial" portion relating to liability and a "penal" portion relating to damages. *See, e.g.,* ***Gardner v. Lovegren***, 27 Wash. at 362 ("Being, then, of a penal nature, it must be construed as other penal statutes are construed, viz., the intent to commit the trespass must appear."); ***Skamania Boom Co. v. Youmans***, 64 Wash. 94, 96-97, 116 Pac. 645 (1911) ("statute . . . is penal in its nature, . . . limited by the rule of strict construction . . . [and] is not applicable to the facts before us."); ***Harold v. Toomey***, 92 Wash. 297, 298, 158 Pac. 986 (1916) ("While . . . this court construes the statute strictly, . . . the statute was enacted . . . to punish a voluntary offender"); ***Luedinghaus v. Person***, 100 Wash. 580, 171 Pac. 530 (1918) (reversing judgment awarding plaintiff treble damages where employees of railroad contractor mistakenly cut timber other than that included in right of way). Given "the repugnance with which this court has persistently viewed the awarding of punitive damages," ***Grays Harbor County v. Bay City Lumber Co.***, 47 Wn.2d 879, 889, 289 P.2d 975 (1955), the Court should be loathe to authorize the plaintiff's recovery of punitive, rather than compensatory, damages for destruction of trees by a fire started on the defendant's land absent clear indication of such a legislative intent.

Indeed, in keeping with its historical purpose, the timber trespass statute has most often been applied to defendants who intentionally or in "reckless disregard of the probable consequences," come onto the plaintiff's land and take plaintiff's timber for profit. ***Smith v. Shiflett***, 66 Wn.2d 462, 467, 403 P.2d 364 (1965); ***Garner v. Lovegren***, 27 Wash. 356, 362, 67 Pac. 615 (1902). Our courts have also applied RCW 64.12.030 where a tenant removes trees without lawful authority in order to improve its leasehold, ***JDFJ Corp. v. International Raceway, Inc.***, 97 Wn. App. 1, 5-7, 970 P.2d 343 (1999), where a neighboring property owner or easement holder cuts ornamental trees or shrubbery without the true owner's permission, ***Tatum v. R & R Cable, Inc.***, 30 Wn. App. 580, 581, 636 P.2d 508 (1981), *rev. denied*, 97 Wn.2d 1007 (1982), or when a defendant aids and abets another's wrongful theft or cutting of trees, ***Bremerton Central Lions Club, Inc. v. Manke Lumber Co.***, 25 Wn. App. 1, 9, 604 P.2d 1325 (1979) (co-defendant sold trees to logging company without acquiring title or authority to sell), *rev. denied*, 93 Wn.2d 1016 (1980). On the other hand, plaintiffs claiming "damages done by fire" have always been limited to compensatory damages, either by statute or by common law. (Arg., at § A.2, *supra*)

Moreover, the Court of Appeals has addressed and rejected applying RCW 64.12.030 when the defendant's activities occur entirely on adjacent property, and are not directed toward the plaintiff's trees. In ***Seal v. Naches-Selah Irr. Dist.***, 51 Wn. App. 1, 3-4, 751 P.2d 873 (1988), *rev. denied,* 110 Wn.2d 1041 (1988), the plaintiffs claimed that seepage from the defendant's irrigation canal damaged plaintiffs' cherry trees, and challenged the trial court's refusal to instruct the jury that it could award punitive damages under RCW 64.12.030. The court affirmed, rejecting the plaintiffs' argument that injury caused by the seepage from defendant's canal "was as much a trespass as the girdling of a tree by a human hand and there should be no distinction drawn between trees damaged by the trespass of an individual with a chain saw, or by the trespass of a thing under a person's control." 51 Wn. App. at 4 (quotations omitted).

Broughton argues that ***Seal*** did not decide "whether RCW 64.12.030 requires physical presence on plaintiff's property or conduct that is directed at plaintiff's property or trees." (Broughton Br. at 24-25) However, the court affirmed the trial court's refusal to instruct the jury under the timber trespass statute because, the court concluded, the statute did not apply "to tree damage resulting

from canal seepage," even though the defendant knew that its canal was leaking on to the plaintiff's property and tried to remediate the problem for well over a decade. 51 Wn. App. at 2-4. Moreover, ***Seal*** correctly reflects the long and consistently recognized purposes underlying RCW 64.12.030:

> The purpose of the statute is threefold: (1) to punish a willful offender; (2) provide for treble damages; and (3) to discourage persons *from carelessly and intentionally removing another's shrubs or trees* on the gamble that the enterprise will be profitable if actual damages only are incurred. . . These purposes do not contemplate an award for canal seepage.

51 Wn. App. at 4 (emphasis added; internal citations omitted).

In sum, ***Seal*** is consistent with this Court's oft-repeated interpretation of RCW 64.12.030 as a punitive remedy for the wrongful cutting or taking of the plaintiff's timber. The case properly refutes Broughton's contention that any deliberate or reckless act that "injures" plaintiff's trees subjects a defendant to punitive damages, and confirms the Legislature's intent to allow the recovery of single compensatory damages for injury to land from a fire that spreads from an adjoining property.

4. RCW 64.12.030 Is Not An "Injury To Trees" Statute.

RCW 64.12.030 is not an "injury to trees" statute as Broughton claims. Again, Broughton's "plain meaning" analysis reads the term "otherwise injure" in isolation. This Court must instead interpret all the words used in RCW 64.12.030, with no portion rendered meaningless or superfluous. ***G-P Gypsum***, 169 Wn.2d at 309. The Legislature limited punitive damages liability to defendants who "without lawful authority," "cut down, girdle, otherwise injure, or carry off" trees located on the "land of another person." It did not authorize punitive damages for any "injury to trees."

Broughton acknowledges that the term "otherwise injure" is a general term that follows the more specific terms of "cut down," and "girdle," but argues against application of the *ejusdem generis* rule of statutory construction – "when general terms are in a sequence with specific terms, the general term is restricted to items similar to the specific terms." ***In re Estate of Jones***, 152 Wn.2d 1, 11, 93 P.3d 147, 152 (2004). *See also* 2A Norman J. Singer, *Statutes and*

Statutory Construction § 47.17, at 282 (6th Ed. 2000).[11] But Broughton does not offer any basis for an "expansive reading" of a punitive damage statute that is narrowly and strictly construed. (Broughton Br. at 10) Nor does Broughton explain why application of *ejusdem generis* would conflict with the Legislature's intent in enacting the timber trespass statute.

Neither ***Silverstreak, Inc. v. Washington State Dept. of Labor and Industries***, 159 Wn.2d 868, 154 P.3d 891 (2007) nor ***McMurray v. Security Bank of Lynnwood***, 64 Wn.2d 708, 393 P.2d 960 (1964) (Broughton Br. at 9-11), supports Broughton's argument. ***Silverstreak*** noted that "the ejusdem generis rule is to be employed to support the legislative intent in the context of the whole statute and its general purpose," but held in that case that its application would "undermine the legislature's intent to protect workers" under the state's prevailing wage act, RCW 39.12.020. 159 Wn.2d at 883 (quotations omitted).

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[11] As an example, the term "other material" in a statute authorizing the sale of "gravel, sand, earth or other material" from state-owned land, did not include commercial timber harvested on state parkland, because timber is not in the same general category as gravel, sand, and earth. Singer at 282, *citing* ***Sierra Club v. Kenney***, 88 Ill.2d 110, 57 Ill.Dec. 851, 429 N.E.2d 1214 (1981).

In ***McMurray***, the Court interpreted a bank's articles of incorporation, which authorized a ". . . sale, conversion, merger, or consolidation to or with, any other banking entity or affiliated financial interest, whether through transfer of stock ownership, sale of assets, or otherwise." 64 Wn.2d at 711-12. The Court held that the words "'or otherwise' were necessary to encompass all of the various types of transactions involved in conversions, mergers, or consolidations", and that the language was sufficiently broad to encompass a conversion to a national bank even though it did not involve a transfer of stock ownership or a sale of assets. 64 Wn.2d at 714. In both ***McMurray*** and ***Silverstreak***, therefore, the term "otherwise" was interpreted in light of the Legislature's clear intent to encompass something more than the preceding descriptive words. Broughton has not made that showing here.

Significantly, ***Silverstreak*** and ***McMurray*** did not interpret a law that imposes liability for punitive damages, a law this court has consistently recognized as penal and thus construed narrowly. These cases provide no support for Broughton's argument that the timber trespass statute must be given an "expansive reading." Rather, just like with other statutes using similar language, this Court should construe "otherwise" injure in RCW 64.12.030 in a

way that implements the principle of *ejusdem generis*. *See, e.g.*, ***Burns v. City of Seattle***, 161 Wn.2d 129, 148, 164 P.3d 475 (2007) ("phrase 'any other fee or charge' must be interpreted in association with 'franchise fee'" which immediately precedes it).

In sum, the Legislature used the words "otherwise injure" in RCW 64.12.030 to refer to activities of a character similar to "cut down," "girdle,"[12] or "carry off." Consistent with the statutory purpose of deterring and punishing the illegal theft of timber, each of these activities requires a defendant "without lawful authority" to enter upon the plaintiff's land or to engage in specific conduct directed toward the plaintiff's trees. The term "otherwise injure" denotes actions, which though short of destroying a tree, involve activities like logging operations or attempts to convert the plaintiff's timber, and are akin to cutting down, girdling or carrying off. RCW 64.12.030 does not apply to a fire started on defendant's lands that spreads to the plaintiff's property and that is not directed at the plaintiff's trees.

[12] To "girdle" means "to cut a girdle around (a plant) usually to kill by interrupting the circulation of water and nutrients." Webster's New Collegiate Dictionary 482 (1981).

5. RCW 64.12.030 Is Not A Common Law Trespass Statute.

RCW 64.12.030 also is not a common law "trespass" statute. Broughton's argument that the scope of the timber trespass law should "expand" with the "modern" common law of trespass, (Broughton Br. at 12, 13), ignores completely the clear statutory language that limits liability to defendants who engage in certain specific enumerated activities deemed unlawful by the Territorial Legislature.

While RCW 64.12.030 uses the term "trespasses," the term is not used, as Broughton claims, to include all activities that might be a "trespass" in the common law sense of the term. Rather, the Legislature used the term to characterize the type of enumerated conduct that constitutes "such trespasses" within the statutory language:

> The statute's use of the phrase 'such trespasses' is in reference to the unlawful acts defined by the statute, cutting down, girdling or otherwise injuring, or carrying off a tree, timber or shrub. Those acts are deemed trespasses.

JDFJ Corp. v. International Raceway, Inc., 97 Wn. App. 1, 6-7, 970 P.2d 343 (1999).

Broughton's contrary argument, that "[b]y using the word 'trespass' in RCW 64.12.030, the Legislature plainly understood the concept in its ordinary sense . . ." (Broughton Br. at 16), was rejected by the very authority it cites – ***JDFJ Corp.*** There, the Court of Appeals held that a tenant of the plaintiff could be liable under RCW 64.12.030 for harvesting 40 acres of timber from the leasehold property to create a parking lot even though a tenant could not be liable for a trespass under the common law, because the defendant's actions were the type of wrong contemplated by the timber trespass statute. 97 Wn. App. at 6-7.

JDFJ Corp. relied on a Ninth Circuit case, ***Rayonier, Inc. v. Polson***, 400 F.2d 909 (9th Cir. 1968), in concluding that "RCW 64.12.030 is not restricted to situations equivalent to common law trespass." 97 Wn. App. at 6. In ***Rayonier***, the court rejected the very argument that Broughton makes here – that the statute "should be construed to contemplate a common law trespass:"

> [T]he use of the phrase 'such trespasses' in the statute is coupled directly with and in fact merely refers to the specific acts which are previously described in the statute. *Some of these acts would not necessarily have constituted common law trespasses, and certainly the treble damage recovery provided by the statute was not contemplated at common law. The Washington legislature clearly had particular evils in mind when it enacted the treble*

> *damage statute and the legislature was not satisfied to limit recovery either to a common law form of action or a common law standard of recovery.*
>
> Since the statute clearly describes the statutory acts which constitute 'such trespasses,' we believe it would be improper statutory construction to require a common law trespass; rather, we conclude that "such trespasses" in the statute was used merely in the more general sense of trespass -- i.e., doing of an unlawful act or of lawful act in unlawful manner to injury of another person or property -- *and the unlawful acts which are contemplated by the statute are specifically delineated therein.*

400 F.2d at 918 n.11 (emphasis added) (internal citations omitted).

The acts listed in the timber trespass statute are not co-extensive with the common law of "trespass." Broughton's additional arguments regarding the "modern" expansion of the common law of trespass do not support its interpretation of RCW 64.12.030.

Review of the Court's common law trespass cases confirms this point. Criticizing "the fallacy of outmoded doctrines," this Court held that a smelter operator could be liable under the common law for "trespass by airborne pollutants" based on evidence that the defendant "acted on its own volition and had to appreciate with substantial certainty that the law of gravity would visit the effluence upon someone, somewhere" in ***Bradley v. American Smelting***

and Refining Co., 104 Wn.2d 677, 683, 709 P.2d 782 (1985) (Broughton Br. at 16). But nothing about ***Bradley*** supports that the Legislature intended in 1869 (or at any other time, for that matter) that one who has committed "trespass by airborne pollutant" has "cut down, girdle[d], or otherwise injure[d], or carr[ied] away" timber under Washington's timber trespass statute.

RCW 64.12.030 was also not at issue in ***Zimmer v. Stephenson***, 66 Wn.2d 477, 403 P.2d 343 (1965) (Broughton Br. at 14-15). In ***Zimmer***, this Court applied the three year statute of limitations for trespass, rather than the two year catch-all statute of limitations, to a common law action alleging that a fire caused by sparks cast directly from defendant's machinery onto adjoining land destroyed plaintiff's wheat crop. Admittedly, the Court held that using improperly maintained equipment was an affirmative act with immediate and direct consequences "from which the fire complained of directly and immediately resulted," 66 Wn.2d at 480, but there was no claim or discussion in ***Zimmer*** of Washington's timber trespass law.

Even if the actions of defendants here may be actionable today under the common law, the common law trespass cases cited by Broughton do not support the conclusion that the

Legislature in enacting a statute making it unlawful for a defendant to "cut down, girdle or otherwise injure, or carry off" trees from the land of another intended to include damage from a fire spreading from adjoining property.[13] Indeed, this Court has long rejected the premise of Broughton's argument "that if the court makes a change in the common law, any statute which was enacted with the existing rule of common law in mind, is automatically amended to conform to the new rule adopted by the court." ***Spokane Methodist Homes, Inc. v. Department of Labor and Industries***, 81 Wn.2d 283, 287, 501 P.2d 589 (1972). And, in fact, the development of the common law of trespass after enactment of RCW 64.12.030 actually confirms that the Territorial Legislature intended to allow compensatory, and not punitive damages, in "an action on the case for the amount of damages thereby sustained," RCW 4.24.060, for a fire that spreads from adjacent land.

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[13] Broughton cites ***Birchler v. Costello Land Co., Inc.***, 133 Wn.2d 106, 942 P.2d 968 (1997), to argue that RCW 64.12.030 should be interpreted to conform to "the progression of Washington's common law trespass decisions." (Broughton Br. at 18) But in allowing emotional distress damages for timber trespass, ***Birchler*** cited cases from as far back as 1906 to support its holding that emotional distress damages have always been available "upon proof of an intentional tort." 133 Wn.2d at 116 & n.4, *citing* ***McClure v. Campbell***, 42 Wash. 252, 84 Pac. 852 (1906) (emotional distress damages available for wrongful eviction). The ***Birchler*** Court did not, as Broughton argues, "expand" the scope of the statute to conform to the common law of trespass.

The most recent amendments to RCW 64.12.030, which maintained the statutory language as it has existed since territorial days, supports the conclusion that the scope of the statute is limited and should not be broadened to encompass modern developments in the common law of trespass. "Because the legislature is presumed to be familiar with past judicial interpretations of statutes, it must be presumed that the legislature was familiar with the Court of Appeals interpretation" of RCW 64.12.030 in ***Seal*** when amending the statute in 2009. ***State v. Fenter***, 89 Wn.2d 57, 62, 569 P.2d 67 (1977) (internal citations omitted). That the Legislature did not broaden the scope of liability to circumstances like those that existed in ***Seal*** or to reflect changes in common law trespass liability recognized in ***Bradley*** and ***Zimmer*** when it amended this "tree theft statute" to include Christmas trees in 2009, is persuasive evidence of its intent to require either a physical presence, or actions directed toward trees "on the land of another" to impose punitive damages under RCW 64.12.030. *See* Laws 2009, ch. 349, § 4; Final Bill Report, HB 1137 (2009).

In sum, "[t]he legislature may change the common law. However, it is not the prerogative of the courts to amend the acts of the legislature." ***Spokane Methodist Homes***, 81 Wn.2d at 288.

See also ***Sedlacek v. Hillis***, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) (Courts "should resist the temptation to rewrite an unambiguous statute to suit our notions of what is good public policy, recognizing the principle that the drafting of a statute is a legislative, not a judicial, function.") (citation and quotations omitted). That is exactly what Broughton would have the Court do. The Court should hold that the Legislature did not intend to subject a defendant to punitive damages for a fire that spreads to the plaintiff's land, where the defendant was never physically present on the plaintiff's property and did not direct its actions toward the plaintiff's property.

B. Other States With Similarly Worded Timber Trespass Statutes Do Not Extend Liability For Punitive Damages To Defendants Who Do Not Enter Upon The Plaintiff's Property Or Purposefully Act To Injure The Plaintiff's Trees.

Broughton claims that other states have construed their "timber trespass" statutes in the way Broughton claims this Court should construe RCW 64.12.030. But, in fact, Broughton either misstates the holdings of courts interpreting identically worded statutes or relies on cases interpreting much different, and substantially broader, statutes that impose liability on all who injure trees.

1. Other States Consistently Interpret Similarly-Worded Statutes To Reject Punitive Damages For Fire Spreading From A Defendant's Land.

The Alaska timber trespass statute, AS § 09.45.730, is identical to RCW 64.12.030. The Alaska Supreme Court has rejected an interpretation of the statute to allow the trebling of damages caused by a fire that spread from the defendant's land where the defendant did not intend to damage the plaintiff's trees. ***Osborne v. Hurst***, 947 P.2d 1356 (Alaska 1997) (Broughton Br. at 22). Contrary to Broughton's assertion, ***Osborne*** did not "implicitly accept[] fire as actionable under [the] timber trespass statute." (Broughton Br. at 22) Rather, ***Osborne*** affirmed a summary judgment dismissing a claim for treble damages, because, as here, the defendant did not act with an intent to "cut, damage, or remove trees." 947 P.2d at 1361.[14]

Similarly, in ***Jordan v. Stevens Forestry Services, Inc.***, 430 So.2d 806 (La. App. 1983) (Broughton Br. at 22) the Louisiana

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[14] ***Osborne*** relied on ***Matanuska Elec. Ass'n, Inc. v. Weissler***, 723 P.2d 600 (Alaska 1986), which affirmed an award of treble damages against an electrical utility for cutting trees outside of its four foot easement on plaintiff's property. Citing the interpretation of similar statutes, including RCW 64.12.030 and .040, ***Matanuska*** noted that treble damages could not be awarded where the defendant has "no intent to enter or to cut the trees," *e.g.*, "an excavator [who] negligently sets off dynamite and injures trees." 723 P.2d at 607.

Court of Appeals *reversed* a trial court's award of treble damages under a statute that makes it unlawful "to cut, fell, destroy, or remove any trees . . ." 430 S.2d at 808 (citing former LSA-RS 56:1478.1 (1983)). The court held that the defendant, who lost control of a deliberately set burn on his own land, lacked the necessary intent for the treble damages provision to apply. It therefore reversed a treble damages award even though the fire was intentionally set, because "the record does not clearly establish any willful *or* intentional acts on the part of Stevens which resulted in the destruction of Jordan's trees." 430 So.2d at 809 (emphasis in original).

In stark contrast to Broughton's characterization, ***Osborne*** and ***Jordan*** both answer in the negative the question presented here: whether plaintiff could recover treble damages where "the alleged acts or omissions of the defendant did not occur on plaintiff's property, and were not directed at plaintiff's trees." (Certification Order at 2-3) Finally, as Broughton concedes, the Mississippi Supreme Court refused to apply Miss. Code Ann. § 95-5-10, its statute imposing treble damages on a defendant who "cut[s] down, deaden[s], destroy[s] or take[s] away" trees, to a utility that allowed a fire to spread from its right of way to plaintiff's tree

farm in ***Redhead v. Entergy Mississippi, Inc.***, 828 So.2d 801 (Miss. App. 2001). *See also* ***McManus v. City of Madison Heights***, 366 Mich. 26, 113 N.W.2d 889, 891 (1962) (statute identical to RCW 64.12.030 did not authorize treble damages against a defendant who applied chemical sealant to a portion of the plaintiff's property; "there is no taking away, no cutting down, and the provisions of the statute relating to treble damages does not apply."); ***Kortsan v. Poor Richards, Inc.***, 290 Minn. 339, 188 N.W.2d 415, 418 (1971) (similar timber trespass statute applied "on its face" "only to damages for willful removal of timber and other products of the soil").

In sum, courts elsewhere construing statutes identical or substantially similar to RCW 64.12.030 hold that a defendant must specifically intend to damage the plaintiff's trees, or "direct" his or her acts at the plaintiff's trees, in order for the defendant to be liable for cutting down, girdling or otherwise injuring, or carrying off timber. These decisions are persuasive in interpreting the language of RCW 64.12.030. *See* ***Wood v. Battle Ground School Dist.***, 107 Wn. App. 550, 560, 27 P.3d 1208 (2001); ***Anaya v. Graham***, 89 Wn. App. 588, 592, 950 P.2d 16 (1998) (analogous

state or federal laws provide guidance for interpretation of similarly worded Washington statutes).

2. Other States' Interpretations Of Broader Statutes Do Not Support The imposition Of Treble Damages.

Broughton cites additional cases from other states under much different statutory language that do not support its argument. First, most of the cases involve true "injury to trees" statutes – that is, laws with much broader language that impose liability on those who "injure" trees in the first instance, rather than on those who "cut down, girdle, or otherwise injure, or carry off" trees as does RCW 64.12.030. For instance, in ***Kelly v. CB & I Constructors, Inc.***, 179 Cal.App.4th 442, 102 Cal.Rptr.3d 32 (2009) (Broughton Brief at 20-21), the California Court of Appeals interpreted a statute, enacted in 1957, that imposes treble damages "[f]or wrongful injuries to timber, trees, or underwood upon the land of another," Cal. Civ. Code. § 3346. The court did not construe a statute applicable to those who "cut down, girdle, or otherwise injure, or carry off" trees.

Kelly is not only inapposite, but it is also in direct conflict with another California decision holding that, even with language much broader than RCW 64.12.030, Cal. Civ. Code. § 3346 did not apply to a contractor who allowed a fire to spread to adjoining

property because a different California statute imposed double damages for allowing a fire to escape onto the land of another and the purpose of the timber trespass law is "to protect timber from being cut by others than the owner." ***Gould v. Madonna***, 5 Cal.App.3d 404, 85 Cal.Rptr. 457, 459 (1970).

Another case Broughton cites, ***Worman v. Columbia County***, 223 Or. App. 223, 195 P.3d 414 (2008), involved both a completely different statute and different facts. There, the court held that a county spraying herbicide on the plaintiff's trees, grass and shrubs alongside a public road could be liable for treble damages under ORS 105.810, which prohibits "willfully injur[ing] or sever[ing] from the land of another any produce thereof." The Oregon Court of Appeals concluded that the statute applied to "direct spraying of herbicide on trees and shrubs – conduct that is a deliberate trespass such as involved in cutting standing timber." 195 P.3d at 424 (quotations omitted).

Worman, then, imposed liability under the Oregon statute because, unlike here, the defendant directed its activities toward the plaintiff's property. Moreover, Broughton makes no mention of the Oregon cases that reject liability for treble damages even under that state's substantially broader statute, where, as here, the

defendant has neither physically entered plaintiffs' land nor directed its activities toward the plaintiff's property. *See* ***Meyer v. Harvey Aluminum***, 263 Or. 487, 501 P.2d 795, 799 (1972) (reversing treble damages for destruction of trees caused by emissions from defendant's aluminum plant because "[o]ur decisions construing these statutes have always involved the cutting of timber."); ***Bergman v. Holden***, 118 Or.App. 530, 848 P.2d 141, 143, *rev. denied*, 318 Or. 170 (1993) ("entry onto the plaintiff's land is an element of the statutory action for timber trespass."); ***Chase v. Henderson***, 265 Or. 431, 509 P.2d 1188 (1973) (statute did not apply to damage caused by crop-dusting chemical that drifted from intended field).

Finally, other out-of-state cases cited by Broughton involve statutory language substantially broader than the language in RCW 64.12.030. *See* ***Kurth v. Aerial Blades, Inc.***, 634 N.W.2d 307, 2001 S.D. 118 (2001) (South Dakota statute provided treble damages "[f]or wrongful injury to timber, trees, or underwood upon the land of another, or removal thereof"); ***Mock v. Potlatch Corp.***, 786 F.Supp. 1545 (D.Idaho 1992) (Idaho statute applied to anyone

who "caus[es] any object, substance or force to go upon or over real property") (both cited in Broughton Br. at 21-22).[15]

In sum, other states' statutes that have been interpreted to impose liability for punitive damages without either a physical presence on the plaintiff's land or intentional acts directed toward the plaintiff's timber involve much broader statutory language than the phrase "cut down, girdle or otherwise injure, or carry off," which has limited the right to punitive damages under RCW 64.12.030 since territorial times. Those cases do not properly assist this Court in interpreting RCW 64.12.030. *See* ***Everett Concrete Products, Inc. v. Department of Labor & Industries***, 109 Wn.2d 819, 826, 748 P.2d 1112 (1988) ("[A] court need not adopt the construction placed on a similar statute in another state if the language of the statute in the adopting state is substantially different from the language in the original statute."). On the other hand, courts interpreting statutory language similar to RCW 64.12.030 have adopted the limitations for liability for timber trespass envisioned by the Territorial Legislature when it imposed

[15] Broughton also cites ***Baker v. Newcomb***, 621 S.W.2d 535 (Mo. App. 1981). (Broughton Br. at 22) But that case affirmed an award of punitive damages for common law trespass. It did not address Missouri's timber trespass statute.

treble punitive damages for the unlawful theft or destruction of timber, but single compensatory damages for the destruction of trees by fire that spreads from adjacent land. Those cases, then, do properly assist the Court.

V. CONCLUSION

The Legislature did not intend RCW 64.12.030 to apply to a defendant who was neither physically present on the plaintiff's property nor directed its activities toward the plaintiff's trees. The Legislature did not intend for the timber trespass statute to subject a defendant to liability for punitive damages for a fire that spreads from the defendant's adjacent land and destroys the plaintiff's trees. Accordingly, this Court should answer the certified question "no."

DATED this 27th day of June, 2011.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 27, 2011, I arranged for service of the Joint Brief Of Defendants Harsco Corporation And BNSF Railway Company, to the Court and to the parties to this action as follows:

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